DOCUMENT RESUME

ED 264 338 UD 024 607

AUTHOR Carter, Robert L.
TITLE Legal Aspects of the Brown Decision.
PUB DATE 84
NOTE 14p.; In: Brown v. Board of Education of Topeka: An Assessment Thirty Years Later (Institute, West Virginia, February 10-11 and April 11-13, 1984). For proceedings, see UD 024 606.
PUB TYPE Viewpoints (120) -- Speeches/Conference Papers (150) -- Historical Materials (060)

EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS Access to Education; Civil Rights; *Court Litigation; *Desegregation Litigation; *Federal Courts; Racial Bias; *Racial Relations; Racial Segregation; School Desegregation; *United States History
IDENTIFIERS *Brown v Board of Education; Plessy v Ferguson

ABSTRACT

In Brown v. Board of Education of Topeka, Kansas, the Supreme Court outlawed segregation in the nation's public schools. This decision has not eliminated racial segregation, but it fundamentally altered the psychological pattern of race relations in the United States. Brown concerned a form of racial discrimination that has virtually vanished from American life: racial segregation enforced by law. Before Brown, 17 States and the District of Columbia mandated segregated public schools, under the "separate but equal" doctrine generated by the Plessy v. Ferguson case in 1896. In 1930, the National Association for the Advancement of Colored People (NAACP) began a campaign that would bring into effect the 14th Amendment's constitutional guarantee of equality for Blacks. The campaign began in States making no provision for the graduate or professional training of its Black citizens. In the first of these cases, the Gaines case of 1938, the Supreme Court eventually ruled that State-imposed racial segregation could pass constitutional muster only if equal facilities were in fact available for Blacks. Throughout the 1940s, the Supreme Court ruled on a series of similar NAACP-instigated cases (including Sweatt v. Painter and McLaurin v. Oklahoma Regents), but it was not until the 1950s that the Plessy v. Ferguson "separate but equal" doctrine was directly challenged: the Court had still to be convinced that racial segregation itself had an adverse effect on a Black child's ability to learn. Today, thirty years after the Supreme Court finally decided that racial segregation was unconstitutional, there are more segregated schools than there were then. Considerable specialized gains have been made, but the economic gap between Blacks and Whites remains wide. Although disparities in educational attainment have narrowed, Blacks continue to find a different system of financial rewards based on education, and the Black unemployment rate, since 1960, has been uniformly twice or more the White unemployment rate. Brown failed, in part, because both Blacks and Whites tend to underestimate the depth of racism in this country. (KH)

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)
☑ This document has been reproduced as received from the person or organization originating it.
☐ Minor changes have been made to improve reproduction quality.
• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY
Thomas W. Cole, Jr.
West Virginia State College
TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

ED264338

LEGAL ASPECTS OF THE BROWN DECISION

THE HONORABLE ROBERT L. CARTER
JUDGE, U. S. DISTRICT COURT, NEW YORK

Today, you begin ceremonies and programs commemorating the 30th anniversary of the Supreme Court's historic decision in Brown v. Board of Education outlawing segregation in the nation's public schools. I am asked, as one of the participants in that 30 year old event, to discuss some of its background legal aspects. My initial reaction was that the topic is rather broad and of relative little general interest except to those fascinated by the law and constitutional theory. Yet, since many of you in attendance at this institution were not even a part of the universe when Brown was decided and might have some misconceptions concerning the constitutional imperatives that inexorably led to Brown, perhaps a statement outlining the basic thrust of the case law and legal theory that culminated Brown might be a useful exercise, particularly on this occasion.

Brown concerned a form of racial discrimination that has virtually vanished from American life--that is racial segregation enforced by state or, in the case of the District of Columbia, federal law. Racial segregation is still much a part of the American scene but it can no longer have the support of the law.

There has never been any dispute that the 14th Amendment was enacted to ensure equal treatment for Blacks. However, early on the United States Supreme Court legitimated racial segregation by announcing a "separate but equal" doctrine in 1896 in a case called Plessy v. Ferguson. Under that doctrine racial segregation was spawned and became firmly entrenched in the South and in a few states outside the South. Because it was founded on law, protests against segregation were unavailing. When one became restless under the pressure of segregation, well meaning whites would advise that after all it is the law. Those who protested

WB034607

Presented at the Symposium celebrating Brown v. Board of Education Supreme Court Decision Of 1954 (Institute, WV, February 10-11 and April 11-13, 1984).

were soothed with homilies about religion and moral precepts effectuating a change in time--100-200 years or else were roughed up or thrown in jail.

Racial segregation is demeaning enough in itself, but there was no pretense anywhere that the states practicing it were providing equal facilities for the segregated group. At the time, some 17 states and the District of Columbia mandated segregated public schools. Typical examples of the disparity can be gleaned from these 1949-50 school year per pupil expenditures: Alabama, $130.09 for whites and $92.69 for Blacks; Georgia, $145.15 for whites and $79.73 for Blacks; Mississippi, $122.93 for whites and $32.55 for Blacks and South Carolina, $154.62 for whites and $79.82 for Blacks. I could go on, but you get the point. Where segregation extended to the college level, separate Black colleges were maintained but no provision was made for the professional or graduate education of Blacks. This institution was one of those land grant colleges originally founded solely for Black students, thereby leaving the University of West Virginia solely for white students.

Up into the 1930's the 14th Amendment had meant very little to Blacks. Its due process clause had become a prime protector of corporate growth and privilege pursuant to the Supreme Court's substantive due process decisions. Its equal protection clause, designed to guarantee equal treatment for Blacks, had been emasculated by the separate but equal doctrine and Supreme Court indifference. In 1930, NAACP lawyers, then headed by Charles Houston, decided to undertake a campaign of test case litigation to render the 14th Amendment the guarantee they felt the framers meant it to be--the constitutional guarantee of equality for Blacks--in effect a Black Magna Carta. It was decided to start this campaign by bringing cases in states making no provision for the graduate or professional training of its Black citizens. The objective was to secure decisions holding that the segregating states were required by the Constitution to provide graduate

BEST COPY AVAILABLE

and professional education for Blacks if such facilities were available for whites. The target was to secure a determination by the Supreme Court to this effect. The Supreme Court was clearly not a sure bet--indeed in the argument of the first of these cases to reach the Court--the Gaines case, which I will tell you about in a moment, when Charles Houston rose to present Gaines' argument, Justice McReynolds swiveled his chair so that his back was to Mr. Houston throughout his argument. The hidden agenda was an indirect attack on segregation, the object being to make it so expensive for the states to establish separate graduate and professional schools for Blacks in law, medicine, journalism, and in all the higher disciplines leading to Masters and Ph.D. degrees that segregation would collapse without a direct assault being necessary.

As I have said, the first of these cases, Missouri ex rel. Gaines v. Canada, reached the United States Supreme Court in 1938. Gaines sought admission to the University of Missouri Law School. Missouri provided no facility for Blacks to learn law. Gaines was refused because of race. The Supreme Court ruled in effect that state imposed racial segregation could pass constitutional muster only if equal facilities were in fact available for Blacks. Gaines was not ordered admitted to the law school, but the constitutional principle had been established.

Gaines disappeared, nobody ever knew what became of him and World War II intervened. By that time a new group of lawyers was on the NAACP legal staff. Thurgood Marshall had become chief counsel, Constance Motley had joined the staff, and I had come on as well as several others. We were impatient with the Houston indirect assault and wanted to mount an all out attack on segregation per se. We were not given the green light to forego the equalization argument solely in favor of a contention that segregation was constitutionally invalid in and of itself. But we were allowed to utilize the argument as a part of an equalization argument as well, and therefore to hone that argument for, as it turned out, later use.

By this time we had secured the support of deans of prestigious law schools (like Harvard), outstanding legal scholars and educators to testify as experts that equal education in graduate schools and in law schools could not be provided under circumstances where Blacks are set apart from whites.

The next case to reach the Supreme Court concerned Ada Lois Sipuel's attempt to secure admission to the University of Oklahoma Law School. That was now 1948. The Court decided that Oklahoma had to provide Blacks with the same facilities offered whites. It took the Court only four days to hand down the decision, a restatement of Gaines, but again her admission was not ordered.

In 1950 two seminal decisions were handed down. In Sweatt v. Painter, Sweatt was refused admission to the University of Texas Law School. The state offered to admit him to a Black law school which it had opened in Houston. The Supreme Court held that in evaluating the two schools in respect of measurable standards--library, faculty, curriculum, prestige of the alumni, the Black school was not equal to the University of Texas. More important it said, that based on the intangibles, the University of Texas had, to a far greater degree, those qualities that are incapable of objective measurement but which make for greatness in a law school. And the Supreme Court for the first time ordered a Black admitted to a white institution. Sweatt was ordered admitted to the University of Texas. McLaurin v. Oklahoma Regents was, perhaps, even more significant--McLaurin was a graduate student at the University of Oklahoma. He was allowed to attend the University and he had the same teachers and access to the same facilities and curriculum as white students. However, McLaurin was given a special seat in in the classroom and a special table in the library and a special table in the dining room. The Court held that these restrictions handicapped McLaurin in his ability to pursue graduate education effectively, impaired his ability to exchange views with his fellow students, or to engage in discussions and learn his profession.

BEST COPY AVAILABLE

These restrictions were ordered removed. Both in Sweatt and McLaurin we asked the Supreme Court to overrule Plessy v. Ferguson but it refused to do so.

At this point we concluded, nonetheless, that Plessy v. Ferguson was in constitutional limbo, if not dead, and we decided to bite the bullet and make an all out attack on segregation at the public school level. The NAACP announced in 1950 that it was backing litigation attacking segregation per se and would no longer back law suits that sought merely to improve segregated schools. The decision created some problems. Some of our close colleagues felt we were acting hastily and were endangering the campaign that had led to Sweatt and McLaurin. Fortunately most of those defections were temporary and most of our dissenting colleagues were back with us within a year. Our biggest problem, however, was to find the appropriate mechanism to convince the courts that grade school segregation was per se pernicious. At the grade school level one cannot point to a markedly superior faculty at the white school, distinguished alumni, or individual isolation as sure indicators that racial segregation per se is disparate education. We could demonstrate wide disparities in physical facilities, per pupil expenditure and limited curriculum, etc. but this might only mean a decision requiring upgrading of the black schools, and we had abandoned that approach in any event. We realized that we had to convince the Court that racial segregation itself had an adverse effect on a Black child's ability to learn. We, therefore, turned for help to our only possible resource--the social scientist.

Professor Otto Klineberg, then at Columbia, had done a study on the achievement scores of Blacks who had come from the South and settled in Philadelphia. This study correlated improvement in these Blacks' test scores to the length of their stay in Philadelphia. I believe the study covered a five year span. I came across the Klineberg study and felt that if the study could be interpreted to mean the low achievement first exhibited could be traced back to the segregated school, it supplied the proof we needed.

We were then preparing for trial in one of the six cases of the Clarendon County case, Briggs v. Elliott, in South Carolina. I met with Dr. Klineberg. He declined to be an expert witness himself but referred me to Dr. Kenneth Clark. Klineberg subsequently did testify for us. Dr. Clark and his wife, Mamie, both psychologists, had devised a doll test the results of which they felt demonstrated that the impact of racial discrimination was perceived at a very early age by Black children. Briefly, the test is administered something like this: the tester would show a Black doll and a white doll to a Black child and inquire which doll do you like most? which is prettier? which one is most like you? which one would you most like to be?, etc., always asking the child to compare and choose one or the other doll. Usually the white doll was deemed prettier, was liked more, and was selected and preferred. I told Dr. Clark that we needed evidence that segregation had a deleterious effect on the Black child's ability to learn. There were a number of social science studies to show the adverse impact of discrimination on Blacks, but few, if any, studies had isolated segregation and measured its pinch. However, fortunately for us, most American psychologists and psychiatrists were of the view that enforced racial segregation was another form of racial discrimination and were willing to attest to that, that it had a deleterious impact. Through Dr. Clark we were able to line up top psychologists, psychiatrists and sociologists as expert witnesses to testify that school desegregation was harmful. We used them as expert witnesses in the five cases that eventually reached the Supreme Court. When our briefs were filed in the United States Supreme Court, it was accompanied by a statement signed by the leading social scientists in the country that segregated education was harmful to the Black child's ability to learn.

The first cases to be tried were Brown, the case from Kansas and Briggs v. Elliot from South Carolina. Both cases were lost, at the trial level, but the

BEST COPY AVAILABLE

Court in the Kansas case said it was persuaded that segregation impaired a child's ability to learn and but for Plessy v. Ferguson, it would have ruled in our favor. That was a tactical victory for our side, we believed, and we felt it had put pressure on the Court. In light of Sweatt and McLaurin, we thought the Court would have difficulty repudiating the views of the Kansas District Court.

The Kansas case (Brown) and the South Carolina case (Briggs v. Elliot) were first argued in the Supreme Court in 1952. At the end of the term in June, 1953--the Court restored Brown and Briggs to the docket and ordered the two cases reargued the following October along with a case from Virginia and a case from the District of Columbia. Subsequently two cases from Delaware were added as well. The six were subsequently argued together--five involving the 14th Amendment and Bolling v. Sharpe, the case from the District of Columbia, involving the 5th Amendment! The Court, in restoring the cases to the docket, asked the parties to address themselves to enlightening the Court concerning the contemporaneous understanding and contemplation of Congress, that authored the amendment and state legislatures that adopted it in respect of the 14th Amendment's impact on segregation in public schools, the understanding of the framers of the Amendment on the power of future legislations or the courts to abolish segregation and the kind of decree the Court was empowered to render--one that would dismantle segregation at once or one calling for its gradual elimination.

That was a hectic but altogether exhilarating summer. We secured the assistance of some of the nation's top historians, educators, political and social scientists and lawyers to help in the research of scholars in the various disciplines to write position papers on various phases of the history of the adoption of the 14th Amendment and its meaning as perceived at the time. During that summer we held a five day conference in New York attended by about 200 scholars. The conference was broken down into the various disciplines. Position papers were presented to each discipline. The papers were critiqued by those

assembled and out of the discussion emerged a consensus which became the approach used in the brief.

As I recall, my role in all this was to interest some of the scholars we wanted to involve in our project, to organize and to make arrangements for the conference. I believe that everyone felt that history was being made, and virtually everyone asked to participate agreed. The conference took place in August, and then came the final push to get the brief we had to submit in final form. My principal role was to write that part of our brief dealing with constitutional legal theory. That became Part I of the brief we filed, and I don't think I got much beyond Part I. The remainder of the brief was devoted to responding to the Court's questions about the history of the 14th Amendment. The brief was filed in due course but argument was postponed from October to December. Chief Justice Vinson had died and Earl Warren had become Chief Justice. The arguments went on for several days and we returned in 1955 for argument concerning the type of relief to be ordered.

My assignment was to argue Brown, the Kansas case in the Supreme Court. Since it was first on the docket, that meant I started the argument and my job was to make a technical legal argument to the effect that the separate but equal doctrine had been decided in a case involving railroad accommodations and had never been examined in respect of its impact on education. It had been assumed by the Court since 1896 that precedent required the Court to apply the doctrine to education but no such precedent existed. The Court adopted this technical legal argument and found the historical evidence inconclusive. It came down on May 17, 1954 with its decision which we commemorate today that racial segregation in the public schools was adverse to the educational guarantees of Black children and hence unconstitutional. In May, 1955, it announced its desegregation with all deliberate speed decree.

BEST COPY AVAILABLE

We regarded ourselves at the time as social engineers, using the law to effectuate change in American life. We believed that outlawing racial segregation would mandate equality for Blacks. As I look back on that period, I recall how confident we all were that if we succeeded, Blacks would inherit equal opportunity. What naivete, but we were naive because we held such a firm trust in our system--in our laws, in our constitution. During the period when segregation had been given respectability under law, our railings against it were met with a response that it is the law. Surely, it seemed to us then that once segregation became unlawful white authorities would adhere to that command of the law as zealously as they had enforced legal regulations to the contrary. Now, my judgment is we had more confidence in the system than it deserved or perhaps it would be more just to say that we placed more faith in the system than we had a right to.

Unhappily, if Brown is to be measured as to its effect on segregation in education, it must be judged a dismal failure. There are more segregated schools today than there were in 1954. If it is measured as to its impact on Blacks' status in the society, it must be deemed ineffectual. Blacks today remain as subjugated and subordinated to whites as was true before Brown. Considerable gains, specialized gains, have been made but the economic gap between Blacks and whites remains wide and measured in terms of income, poverty and unemployment wide economic disparities between Blacks and whites have not lessened appreciably since Brown was decided and may have widened.

The differences between Black and white family income has remained relatively constant since 1954. Median income for Black families as a percentage of median income for white families was 55% in 1960 and, after rising to 61.5% in 1975, fell again to 56% in 1981. Black family income as a proportion of white family income fell for married couple families in which the wife did not work and in

female headed families. Black married couples in which the wife worked, however, did record slight gains in their income compared to white families.

Both Black and white family incomes have shifted upward but, Black family incomes did so at a slower pace, so that most Blacks today remain clustered at the lower end of the income scale. In 1981, for example, 55% of all Black families had incomes under $15,000 compared to only 28% of all white families.

Educational differences between Blacks and whites does not explain these income disparities. The median years of school completed rose from 7.7 and 8.6 for Black males and females respectively in 1960 to 12.1 for both in 1981. The comparable figures for white males and females in 1981 were 12.6 and 12.5--only one-half year more than Blacks. The gap in the illiteracy rates for Blacks and whites has also almost closed.

Despite this educational progress, however, Blacks find a different system of financial rewards based on education than whites. For example, in families headed by high school graduates, 48% of Blacks and 26% of whites had 1980 incomes under $15,000. In families where the head completed four years of college, 9% of Blacks and 21% of whites earned $50,000 or more. The income distribution of Black families whose heads have completed four years of college parallels the income distribution for white families headed by high school graduates.

Wide disparities exist in the labor force participation and unemployment rates of Blacks and whites, with Blacks at a severe disadvantage. The unemployment rate for Blacks since 1960 has been uniformly twice or more the unemployment rate for whites.

The percent of Blacks in the labor force has also dropped over time, and the number of males not participating in the labor force is rising faster for Blacks than for whites. In 1960, 74% of the Black male population age 16 and

BEST COPY AVAILABLE

over had jobs; this ratio has since fallen steadily to 55% in 1982. Moreover, the types of jobs held by Blacks differ from those held by whites. Blacks are overrepresented in the service, unskilled-labor and other lower-wage occupational categories. At the same time, Blacks are underrepresented in professional, administrative and other white-collar and skilled blue-collar jobs.

The social consequences of these economic disparities for Blacks are not surprising. Blacks have higher infant and maternal mortality rates, shorter life spans, and a greater incidence of teenage pregnancy. Blacks are overrepresented in jails and prisons, and are more likely to be victims of crime. Black men are over six times as likely as white men to be victims of homicide. Roughly 55% of Black children under 18 years of age are reared in poverty.

Brown has succeeded only in outlawing formalized public discrimination. That has been accomplished in all aspects of American life. That is a small plus.

The failure of Brown to have the impact we hoped for is because the extent and depth of racism in the country is only dimly perceived by whites and often by Blacks as well. Let me give an example which I found startling. You all have probably heard of the study made some years ago by a Harvard professor, then at the University of California. (There was a dispute at the time as to who should claim credit for the study.) In any event, he told a group of teachers that certain of their students were bright and others not so bright. This was an arbitrary designation. The teachers reacted to his designation and treated the children designated bright as gifted, giving them their full attention and wasted little time with those designated not so bright--indeed dismissed them as dullards. Some years later two professors tried this same experiment in multi-racial classrooms in Illinois. They told the teachers--who were white--that some white children were gifted and some Black children were gifted and some in both groups were slow learners. The results will probably surprise you. Both

groups of white children received better treatment and more attention than either Black group. But the gifted Black children were treated worst--criticized constantly and dealt with more harshly than the others. One more depressing fact, to me, is that the white teachers involved reacted uniformly and some were young. This left me to believe that the future is not so bright either.

The basic insights this study affords as to the real nature of the race problem in this country was not perceived in 1954 and in many places and unfortunately is not even perceived today. We felt in 1954 that racial segregation was the basic evil and Brown was so welcome because it seemed to have rid us of this problem in one easy stroke. However, what makes the race problem so intractable is that the evil that must be conquered before the racial problems that plague us are resolved is white supremacy. Brown is important because it made the real problem more visible than it had ever been.

This country has taken white supremacy so much for granted that many of you may not understand the stress I place on it. After all, the country is predominantly white and nothing is wrong with white supremacy, you may say, as long as non-white minorities are accorded their rights. That's true, however, non-white minorities will not be fully granted their rights unless white supremacy is dealt with. No dominant group in history has ever been know to relinquish its perogatives of power and privilege voluntarily. Moreover, the problem becomes magnified almost beyond solution because, as Louis Harris states in a book called Anguish of Change, Blacks and whites do not like each other as groups. And, this antipathy, between Blacks and whites has grown, or to put it more accurately, is more visible today than it was when Brown was decided.

Brown has contributed to this visibility, if not the intensification, of this group disinfatuation. The sedateness and ritualistic protocol which used to mark racial encounters has been replaced with cacophony, rudeness and open disdain.

Fear and unease on the part of whites has always been there but masked by fantasy and a refusal to face the truth. Blacks have always been resentful. Scratch a Black skin and you will uncover anti-white feelings and the deeper you probe, the more you expose the vehemence of these sentiments. Before Brown these feelings were masked and kept under control. Black inferiority is a fact of life in America and before Brown was accepted as a theoretical truth by both groups.

Brown altered the psychological pattern of race relations. By mandating equality for Blacks as constitutionally guaranteed at least in all the public reaches of public life, Brown revolutionized race relations in this country. Heretofore, being Black had been a mark of oppression--a curse. After Brown, being a Negro went out of fashion. Negroes became Black. Since they were equal under law to whites, they could accept their Blackness, their physical differences from whites, without hurt or shame; Black became beautiful. Blacks were able to free themselves of the heavy burden. They could feel better about themselves.

Blacks have now gained confidence that they can control their own destiny. They have little faith in white institutions or that any white controlled instrumentality will fully support their continuing drive for equal rights. I do not know how this will all end. Over the last two decades, Blacks have sought to gain leverage in the political arena and that drive has been intensified in the last few years. I have no assurance that all will end well. What I can say in closing is that Brown has helped show us what the real problem is. Only by facing up to that problem and seeking to solve it can we have any serious expectation that ours will some day evolve into a democratic classless society, free of racial strife.

BEST COPY AVAILABLE